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In the Supreme Court of the United States

October Term, 1945

The Order of United Commercial Travelers of America, a corporation, Petitioner,

-vs-

Edward C. Wolfe

PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Attorneys for Petitioner

In the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, The Order of United Commercial Travelers of America, respectfully shows as follows:

The Order of United Commercial Travelers of America hereby petitions the Honorable Court that a writ of certiorari issue to review a judgment and decision of the Supreme Court of the State of South Dakota, which affirmed a judgment of the Circuit Court in and for Pennington County, South Dakota, and which decision of the said Supreme Court was made and entered on the 15th day of May, 1945, and timely application for rehearing thereon denied on the 26th day of June, 1945. The opinion of the Supreme Court of the State is reported in 18 N. W. 2d, page 755, (R 53) and is not yet officially reported in the South Dakota Reports.

NATURE OF PROCEEDINGS BELOW

Petitioner is a fraternal benefit association organized under the laws of the State of Ohio, and having its place of business and domicile at Columbus in said State. Edward C. Wolfe, a resident and citizen of the State of Ohio, brought an action in the Circuit Court of Pennington County, South Dakota against Petitioner to recover certain death benefits on a certificate of insurance which it had issued to a member, Ford Shane. The Certificate named Ford Shane's mother, Elizabeth Shane, as beneficiary, but the claim for benefits had been assigned by her to the said Edward C. Wolfe. The Circuit Court gave judgment to Wolfe for the amount of the indemnity and interest. Petitioner then appealed to the Supreme Court of the State of South Dakota, which gave judgment on May 15, 1945 affirming the judgment of the Circuit Court. Petition for rehearing was timely made, and the Supreme Court denied this on June 26, 1945. On Sept. 11, 1945 an order was made by a Justice of this Court which extended the time for filing petition for certiorari to and including Oct. 26, 1945. (R 67). It is for the review of this final judgment of the Supreme Court that this petition is made.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under sub-division (b) of Section 237 of the Judicial Code (Section 344 of 28 U. S. Code), as amended by Act of February 13, 1925, in that a right, title, privilege and immunity was set up and claimed by Petitioner under the Constitution of the United States, and such right, title, privilege and immun-

ity, was denied to Petitioner by the decision and judgment of the Supreme Court of the State of South Dakota, which is hereby sought to have reviewed.

The particular provision of the federal Constitution under which Petitioner claims it was denied rights is Article 4, Section 1, which provides that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"; and Petitioner claims that the judgment of the South Dakota Supreme Court did not give full faith and credit to the public acts, records and judicial proceedings of the State of Ohio. The judgment of the South Dakota court was entered May 15, 1945, and the order of the Court which denied the petition for rehearing was entered on June 26, 1945. (R 64) The Supreme Court is the highest court of the State of South Dakota, and the said judgment was a final judgment. (R 63)

SUMMARY AND STATEMENT OF MATTERS INVOLVED

Petitioner is here seeking a review of the decision and judgment of the Supreme Court of South Dakota dated May 15, 1945, in an action in that Court entitled Supreme Court Docket No. 8756, Edward C. Wolfe, Plaintiff and Respondent vs. The Order of United Commercial Travelers of America, a corporation, Defendant and Appellant. The said Edward C. Wolfe, a citizen and resident of Ohio, brought an action in the Circuit Court of Pennington County, South Dakota to recover on a certificate of insurance which said The Order of United Commercial Travelers of America, Petitioner here-

in had issued to one of its members, Ford Shane, on December 21, 1922. Ford Shane died May 8, 1931. The beneficiary in the certificate, Elizabeth Shane, claimed indemnity for his death under such certificate, and later assigned her claim to the said Wolfe. Petitioner is a fraternal benefit association organized under the laws of, and domiciled in, Ohio. It makes provision in its constitution for the payment of benefits by assessment on its members, and issues to members certificates assuring payment of such benefits. Petitioner set out in its answer in the suit that the contract of insurance provided that no suit to recover benefits shall be brought after six months from the date the claim for such benefits is disallowed by the Supreme Executive Committee of Petitioner, and that the time for bringing suit had passed; in connection therewith, Petitioner set out that Section 1 of Article 4 of the United States Constitution required that the contract of this Ohio fraternal benefit association be enforced, and claimed the benefit and protection of such provision of the Constitution. Also, Petitioner requested the trial court to hold that the contract was an Ohio contract, made by a fraternal benefit association of the State of Ohio, and should be construed according to the law of Ohio; that the hazard insured against was death from bodily injury effected through external, violent and accidental means, and that this death was not produced by such means under the law of Ohio. The circuit Court denied both contentions of Petitioner, and appeal was taken to the Supreme Court under assignments of error that the trial court had violated Section 1 of Article 4 of the United States Consti-

tution in refusing to sustain Petitioner's contentions. The South Dakota Supreme Court considered these contentions, and held against them in both instances. The facts and circumstances of the matters involved are amplified and set forth more in detail in the statement of the case in the supporting brief annexed hereto.

QUESTIONS PRESENTED

1. Does the Full Faith and Credit Clause of the United States Constitution, Section 1 of Article 4, require, under the circumstances of this case, that the provisions of the constitution of the petitioning Order, an Ohio Fraternal Benefit Association, which allows no suit to recover benefits on an insurance certificate issued to a member to be brought later than six months from the rejection of the claim, shall be recognized and enforced by the Court in South Dakota in face of a limitation statute in South Dakota which allows the suit to be brought within six years, and in face of another South Dakota statute which declares to be void any stipulation in a contract which limits the time provided by statute within which an action may be brought thereon? The State Court decided that the federal constitution did not. Petitioner claims that such decision was erroneous, and review of that decision is sought.

2. Was the South Dakota Court required by the Full Faith and Credit Clause of the Federal Constitution to construe the contract of insurance, and particularly that portion of the contract which provides indemnity shall be allowed only when the injury or death is the result of bodily injury ef-

fected through external, violent and accidental means, according to the law of Ohio as ascertained from the decisions of the Supreme Court of that State? Petitioner contended before the State Court that said provision of the Federal Constitution did so require, to which the State Court seems to have acceded. But, following this inquiry, and assuming that it should be answered in the affirmative, did the South Dakota Supreme Court err in assuming that the Ohio Court would decide that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means? Petitioner is contending that the South Dakota Court did so err, and asks a review of its decision.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The South Dakota Supreme Court has decided a substantial question of right under the Federal Constitution in a way probably not in accord with applicable decisions of this Court.

2. The grounds brought forward by the State Court to avoid the effect of the decisions of this Court have not heretofore been considered and determined by this Court. The State Court ruled that the doctrine of Supreme Council Royal Arcanum v. Green, 237 U. S. 531; M. W. of America v. Mixer, 267 U. S. 544; and Sov. Camp W. O. W. v. Bolin, 305 U. S. 66, declaring rights under membership in a fraternal benefit association, had been modified and limited by Pac. Employers Ins. Co. v. Industrial Acci. Comm., 306 U. S. 493; Griffin v. McCoach, 313 U. S. 498; and Pink v. A. A. A. Highway Express, 314 U. S. 201, so that such rights were not

protected under the full faith and credit provision of the Federal Constitution. This has not been specifically considered by this Court.

3. Petitioner interposed as a substantial defense in this action a claim of rights under the Constitution of the United States, and raised a substantial federal question before the State Court. The denial of these rights asserted as a defense will subject Petitioner to irremedial liability unless this Court assumes jurisdiction and corrects the erroneous (as we believe) ruling and decision of the state court. John Hancock Mut. L. Ins. Co. v. Yates, 299 U.S. 178, 183; Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160.

PRAYER FOR RELIEF

Wherefore, Petitioner prays that a writ of certiorari issue out of and under the seal of this Court, which writ shall command the said State Court or Courts of South Dakota to certify and send to this Court a full and complete transcript of the record of proceedings in said Courts, including a transcript of the proceedings on the appeal to the Supreme Court of the State of South Dakota; said proceeding in the Supreme Court being numbered and entitled "Supreme Court Docket No. 8756, Edward C. Wolfe, Plaintiff vs. The Order of United Commercial Travelers of America, a corporation, defendant", to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States; and the judgment and decision of the South Dakota Supreme Court in the case be reversed by this Court, and the Peti-

tioner given such other relief as to this Court may seem proper.

Respectfully,

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Pierre, South Dakota

E. W. Dillon, 632 North Park St.,
Columbus, Ohio

Attorneys for Petitioner.

INDEX TO BRIEF

	Page
Statement of Jurisdiction	1
Statement of the Case	6

Argument:

1. Rights of membership in a Fraternal Beneficiary Association are governed by the law of the state of incorporation. Another state cannot attach to the membership rights against the society which are refused by the law of the domicile 11
2. The six months limitation in the contract of insurance conditions the right of recovery against, and limits the liability of, the fraternal benefit society, and pertains to substantive rights rather than to the remedy 13
3. The claimed conflicting statute in South Dakota is not merely a statute of limitations; it declares void contracts which fix the time within which suits may be brought, and deals with the powers and capacities of persons. 14
4. In Ohio, the established rule is that injury or death which ensues as a consequence of a voluntary course of conduct is not produced by accidental means. 16
5. The South Dakota Supreme Court without reasonable basis assumed that the Ohio courts would hold that the death of Ford Shane was produced by external accidental means. 18
6. The South Dakota Court without reasonable basis assumed that there was a presumption that the death of Ford Shane was caused by external accidental means. 18
7. An erroneous ascertainment of what the applicable law in Ohio is, as effectually denied to Petitioner the benefit of the Ohio law, as if the South Dakota Court had refused to apply the Ohio law. 20
8. The governmental interests of the State of Ohio as the state of the domicile of this fraternal benefit association, under the circumstances of this case, clearly outweigh and overbalance the interests of South Dakota, the state of the forum. 20

CITATIONS

Page

Cases and Authorities:

Alaska Packers Ass'n v. Comm'n., 294 U. S. 532, 547 ..... 20, 22
Am. Jurisprudence, Vol. 29, p. 1082, § 1148 19
Bradford Elec. Light Co. v. Clapper, 286 U. S. 145, 160 5
Broderick v. Rosner, 294 U. S. 629 12
Burns v. Employers Liability Assur. Corp., 134 O. St. 222, 16 N. E. 2d 316 16
45 C. J. 56, note 22 22
44 C. J. S. p. 509b 22
Dolan v. Royal Neighbors, 12 Mo. App. 147, 100 S. W. 498 ..... 14, 15
Graham v. N. Y. Life Ins. Co., 182 Wash. 612, 619, 47 Pa. 2d 1029, 1032 19
Hartford Acci. & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143 21
Hassey v. Metropolitan Life Ins. Co., 140 O. St. 266, 43 N. E. 2d 229 ..... 16, 17, 19
Home Ins. Company v. Dick, 281 U. S. 397 ..... 5, 13, 14
John Hancock Mut L. Ins. Co. v. Yates, 299 U. S. 178, 183 ... 5
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487 20
Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491 17
Mitchell v. Industrial Comm., 135 O. St. 110, 19 N. E. 2d 769 19
Mitchell v. N. Y. Life Ins. Co., 136 O. St. 551, 27 N. E. 2d 243 ..... 16, 17
Modern Woodmen of America v. Mixer, 267 U. S. 544 .. 12, 16, 22
New Amsterdam Casualty Co. v. Johnson, 91 O. St. 155, 110 N. E. 475 16
Order of U. C. T. v. Shane, 64 Fed. 2d " (CCA 8) 8
Pac. Employers Ins. Co. v. Industrial Acci. Commission, 306 U. S. 493 20
Pink v. A. A. A. Highway Express, 314 U. S. 201 ..... 20, 21
Sov. Camp W. O. W. v. Bolin, 305 U. S. 66 12
Supreme Council Royal Arcanum v. Green, 237 U. S. 531 ... 11
Truax v. Corrigan, 257 U. S. 312 20
Union Central Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S. W. 339 14
Wastun v. Lincoln Nat'l Life Ins. Co., 12 F. 2d 422 22
Young v. Order of U. C. T., 142 Neb. 566, 7 N. W. 2d 81 22

Statutes:

South Dakota Code of 1939, § 10.0705 ..... 14, 15
South Dakota Code of 1939, § 33.0232 15
General Code of Ohio, § 9469 12
General Code of Ohio, § 9473 13

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ON PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of the State of South Dakota (R 53) is reported in 18 N. W. 2d 755. It has not yet been officially reported in the South Dakota Reports.

STATEMENT OF JURISDICTION

(a) Jurisdiction of this Court is invoked under Sub-division (b) of Section 237 of the Judicial Code (§344 of 28 U. S. Code), as amended by Act of Congress of February 13, 1925, in that a right, title, privilege and immunity was set up and claimed by Petitioner under the Constitution of the United States, and such right, title, privilege and immunity was denied to Petitioner by the decision and judgment of the Supreme Court of the State of South Dakota, which is hereby sought to have reviewed.

(b) The particular provision of the Federal

Constitution under which Petitioner claims it was denied rights is Section 1 of Article 4 of the United States Constitution, which provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state".

(c) The judgment of the Supreme Court of the State of South Dakota sought to have reviewed is dated May 15, 1945. (R 63) A petition for rehearing was timely made and entertained by the Court, which was denied on June 26, 1945. (R 64) On Sept. 11, 1945, an order was made by a Justice of this Court which extended the time for filing petition for certiorari to and including Oct. 26, 1945. (R 67) This petition for Writ of Certiorari is presented to this Court on October , 1945. The opinion of the South Dakota Supreme Court given upon rendering the said judgment (R 53) is reported in 18 N. W.2d 735, but has not been as yet published in the official South Dakota Reports. There was no opinion given on denying the petition for rehearing.

(d) The federal question sought to be reviewed, viz: that rights were claimed by Petitioner under §1 of Article 4 of the United States Constitution and were denied to it, was first raised by Petitioner by its Answer to the Complaint filed in the trial court. (R 9). In such Answer, Petitioner set up that it was a fraternal benefit society created by the laws of the State of Ohio; that it had accepted Ford Shane as an insured member; that the constitution of the Society, which formed a part of the contract of insurance, provided that no suit for indemnity to recover bene-

fits shall be brought after six months from the date the claim for such benefits is disallowed by the supreme executive committee and that claim of the beneficiary for indemnity for the death of Ford Shane was so disallowed on June 8, 1931, and that the suit was too late and barred under the limitation in the contract; that such contract was valid under Ohio law, and was binding on the Plaintiff in his suit to recover. (R 6 to 9 .....)
Then followed this allegation:

> "That this is true because Section 1 of Article IV of the Constitution of the United States provides that 'Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state'. That defendant relies upon said provision of the United States Constitution in this action, and claims the right to be protected thereunder. That to deny that said provision of the Constitution of the defendant Order, which limits the time to bring suits on certificates of insurance to six months as aforesaid, is binding on Plaintiff and valid, would be a violation of said Section 1 of Article IV of the Federal Constitution, and a violation of defendant's rights thereunder (R 9 .....)

The trial court ignored and denied Petitioner's contention on this issue. (See Decision R 18 to 24)

Again, the Petitioner set up in its answer in the trial court that the contract of insurance provided for indemnity only when external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, dis-

ability or loss; and that external, violent and accidental means, producing bodily injury, was not the proximate, sole and only cause of the death of Ford Shane. (R 5, 6, § IX)

Petitioner asked the trial court to find and hold that the insurance contract was an Ohio contract, and was governed by the Ohio law. (R 16 .....) Petitioner asked the trial court to find and hold that the suit was barred by the six months limitation in the contract of insurance (R 12, 13 § XII) and to find and hold that the death of Ford Shane was not caused by external, violent and accidental means. (R 12 § XI .....) The trial court refused to make these findings. (R 17 ..... and 18 to 23 .....)

Petitioner filed assignments of error for the purposes of its appeal to the Supreme Court of the State of South Dakota. By such assignments, Petitioner claimed error because the trial court did not find and hold that the death of Ford Shane was not caused by external, violent and accidental means; (R 51, §§ 3 and 4 .....) and claimed error because the trial court did not find and hold that the action was barred by the six months limitation in the contract of insurance (R 51 § 5 .....) Petitioner also asserted the following as error of the trial court:

> "(8) The trial court erred in its findings, conclusions, and judgment in failing to give effect to the law of the state of Ohio in construing the insurance contract involved, in that (a) under the undisputed facts of the case, and under the Ohio law, the death of Ford

Shane was not occasioned by external, violent and accidental means; and (b) in that likewise, this action was barred because not brought within six months from the disallowance of the claim by the Supreme Executive Committee of the defendant Order. (R 51)

"(9) The trial court erred in its findings, conclusions and judgment, because in construing the insurance certificate and contract involved, it did not give full faith and credit to the public acts, records and judicial proceedings of the State of Ohio, in respect to the matters set forth in the preceding assignment, and the court thereby in and by its decision violated Section 1 of Article IV of the Constitution of the United States. (R 51 .....)"

The South Dakota Supreme Court considered the issues raised by the above assignments of error and passed upon and decided them adversely to the contention of the Petitioner. That of itself seems to be sufficient. Home Insurance Co. v. Dick, 281 U. S. 397, 407.

Thus, Petitioner interposed as a substantial defense in this action a claim of rights under the Constitution of the United States, and raised a substantial federal question before the State Court. The denial of these rights asserted as a defense will subject Petitioner to irremedial liability, unless this court assumes jurisdiction and corrects the erroneous (as we believe) ruling and decision of the state court. John Hancock Mut. L. Ins. Co. v. Yates, 299 U. S. 178, 183; Bradford Elec. Light Co. v. Clapper, 286 U. S. 145, 160.

STATEMENT OF THE CASE

Petitioner is a mutual fraternal benefit association organized under the laws of, and domiciled in, Ohio. (R 30 Ex 8, Intr. at R 48 .....) It has a lodge system with ritualistic form of work, and a representative form of government. It transacts its affairs without profit and for the mutual benefit of its members and their beneficiaries. It makes provision for the payment of benefits by assessment on its members, and issues to members certificates assuring payment of such benefits. (R 45 Ex 12-A Intr. R 49)

On December 21, 1922, it accepted Ford Shane of Rapid City, South Dakota as an insured member. (R 26-A Ex 2 .....) It issued to him an insurance certificate on that date which provided that the certificate, the Constitution, By-Laws and Articles of Incorporation of the Order, together with the application for insurance signed by said insured member, shall constitute the contract between said Order and said insured member, and shall govern the payment of benefits, and any changes, additions or amendments to said constitution, By-Laws or Articles of Incorporation hereafter duly made, shall bind said Order and said insured member and his beneficiary or beneficiaries, and shall govern and control in all respects. (R 26-A Ex 2 .....)

Section 3 of Article IV of the Constitution of the Petitioning Order provided that "insured members shall be indemnified in accordance with the terms hereinafter set out in this article against the results of bodily injury hereinafter mentioned, effected through external, violent and accidental means, herein termed the accident, which shall be

occasioned by the said accident alone and independent of all other causes". (R 46 Ex. 12-A, § 3 Art. 4) Exhibit 12-A was introduced at R 49. The indemnity for death was $5000.00 in cash and $1300.00 in weekly installments of $25.00. (R 46, Ex. 12-A, § 3 Art. 4) Section 7 of this Article IV, under the subject of exemptions, provides: "Nor shall benefits under this Article be payable unless external, violent and accidental means, producing bodily injury, is the proximate, sole and only cause of death, disability or loss". (R 47, Ex. 12-A).

Section 11 of Article IV of the Constitution of said Order provided:

> "Section 11. No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for such benefits is disallowed by the Supreme Executive Committee.
>
> "No Grand or Subordinate Council, officer, member or agent of any Subordinate Council, Grand or the Supreme Council of the Order, is authorized or permitted to waive any provisions of the Constitution of this Order, relating to insurance, as the same are now in force, or may be hereafter enacted.", (R 47, Ex. 12-A,)

On May 8, 1931, the insured, Ford Shane, died. The beneficiary submitted proofs to the Order claiming that the death of Ford Shane was the result of bodily injury effected through external, violent and accidental means, and asked for the death

benefits. The claim was rejected by the Supreme Executive Committee of the Order on June 8, 1931, (R 29 Ex. 7, Intr. at 48 .....) and prompt notice sent to the beneficiary. The beneficiary, Elizabeth Shane, brought an action on the certificate which was carried to the U. S. Circuit Court of Appeals, Order of U. C. T. v. Shane, 64 Fed.2d 55 (CCA 8), and later dismissed.

The beneficiary assigned her claim to Edward C. Wolfe, a citizen and resident of Ohio. (R 27 Ex. 5, Intr. at 48 .....) In June, 1934, he brought an action on the certificate and his assignment thereof, in the Circuit Court of Pennington County, South Dakota. (R 1 and 2 .....). Judgment was given for Wolfe in the Circuit Court; (R 24 .....) from which the Order appealed to the Supreme Court; (R 52 .....) which court on May 15, 1945, gave judgment affirming the judgment of the Circuit Court. (R 63 .....)

In its answer in the suit by Wolfe in the Circuit Court, Petitioner set forth the provisions of Section 11 of Article IV of its constitution relating to the time when suits must be brought, and pleaded that the suit by Wolfe had been brought too late; (R 8 and 9 .....) Claimed that full faith and credit should be given to the provisions of the Constitution of the Order as a part of the public acts, records and judicial proceedings of the State of Ohio, and claimed the benefit of Section 1 Article IV of the United States Constitution, and asked to be protected thereunder. (R 9 .....) At the trial in the Circuit Court, the Order requested the Court to find and decide that the insurance certificate was an Ohio contract, and that the

law of Ohio governed in its construction; (R 16 .....) and that under Ohio law, the provision of its constitution that no suit should be brought after six months was a valid agreement binding on the insured and its beneficiary; (R 12, 13 § XII .....) Petitioner also asked the Court to find that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means. (R 12 § X .....). The Circuit Court refused to so hold. (R 17 and 18 to 23 .....) Upon its appeal to the Supreme Court, Petitioner assigned as error the refusal of the Circuit Court to hold that suit was barred by the six months limitation in the contract, and as error the refusal of the Circuit Court to hold that the insurance certificate was an Ohio contract, and that the Ohio law governed, and that under Ohio law the death of Ford Shane was not the result of bodily injury effected through external, violent and accidental means, and that such refusal to so hold in these matters violated the rights of the Petitioner under Section 1 of Article IV of the Constitution of the United States. (R 51 § (8) and (9) .....) These issues were presented to the Supreme Court upon the appeal, and considered by the Court and decided by that court adversely to the contentions of the Order. (See opinion of the Court R 53 .....)

The circumstances of the death of Ford Shane are substantially as follows:

On May 8, 1931, he went to the offices of Doctors Doyle and Janis at Rapid City, South Dakota for the purpose of having an examination made to

ascertain if he had a stricture or obstruction of the posterior urethra. (R 32 Ex. 9, ...) Exhibit 9 was introduced at R 48. A stricture is caused by scar tissue being laid down in the canal from previous infection. The examination is made by introducing an instrument called a sound into the canal and probing until the obstruction is located. (R 41, 42 Ex. 9 .....) It is routine to make the examination with local anesthetic (R 39 Ex. 9 .....) It can be done without the use of an anesthetic, but it is extremely painful and severe on the patient. (R 40 Ex. 9 .....)

At this time, Dr. Janis placed Shane on the table, told him he was going to deaden his urethra, and for that purpose injected four cc's of butyn therein. (R 33 Ex. 9 .....) The patient immediately went into convulsions, became synotic, and in about two minutes died. (R 33 Ex. 9 .....) Butyn is a cocaine derivative, and is commonly used for local anesthesia. (R 33) The quantity used was in approved amount. (R 35, 38 Ex. 9 .....) Drs. Janis and Doyle were licensed and experienced physicians. No mishap, slip or accident is shown to have occurred in making the injection. The usual result of such use of butyn is to anesthetize the parts treated, and thus render the examination painless and without injury to the patient. (R 35 Ex. 9 .....) But this patient had a bodily condition, sometimes called an idiosyncracy, which caused it to react to the drug in an unusual and unexpected day. (R 34, 37 Ex. 9 .....) Such a reaction as here occurred is known to occur rarely, but is

so rare that the medical profession does not take it into account in administering the drug. No test can be made in advance to determine whether the idiosyncracy exists. (R 38 Ex. 9 .....) Dr. Janis, the attending physician, testified that the immediate cause of Mr. Shane's death was the idiosyncracy. (R 35 Ex. 9 .....) Dr. Doyle, also attending physician, testified that "the idiosyncracy was the cause of the succession of events that occurred". (R 40 Ex. 9, ...) The trial court found in its decision that the death "resulted on account of the idiosyncracy" and that the sole and proximate cause of the said death was such administration of said butyn to the body of deceased when deceased had such unknown idiosyncracy. (R 22 § XV)

ARGUMENT

The points and contentions we are making are set out in headlines, followed by a discussion for each one. The several headlines form a summary of the points in the argument.

I.

ENTRY INTO MEMBERSHIP OF AN INCORPORATED BENEFICIARY ASSOCIATION IS MORE THAN A CONTRACT; IT IS ENTERING INTO A COMPLEX AND ABIDING RELATION, AND THE RIGHTS OF MEMBERSHIP ARE GOVERNED BY THE LAW OF THE STATE OF INCORPORATION. ANOTHER STATE CANNOT ATTACH TO THE MEMBERSHIP RIGHTS AGAINST THE SOCIETY WHICH ARE REFUSED BY THE LAW OF THE DOMICILE, EVEN THOUGH SUCH MEMBER MAY BE A RESIDENT OF SUCH OTHER STATE.

Supreme Council Royal Arcanum v. Green, 237 U. S. 531

Modern Woodmen of America v. Mixer, 267 U. S. 544

Sov. Camp W. O. W. v. Bolin, 305 U. S. 66.

See, also, Broderick v. Rosner, 294 U. S. 629.

The above doctrine is firmly established by the above decisions and has been consistently adhered to The South Dakota Court recognized it as existing, and attempted to apply it in part to the circumstances of this case. See opinion, 18 N. W.2d at (7) page 758. (R 58)

Section 9469 of the General Code of Ohio relating to fraternal benefit societies was a part of the Ohio statute law at all times after Ford Shane took out his insurance certificate, and reads as follows:

> "**Section 9469. Certificate shall Constitute Agreement.** Every Certificate by any such society shall specify the amount of benefit provided thereby, and shall provide that the certificate, the charter or articles of incorporation, or if a voluntary association, the articles of association, the constitution and laws of the Society and the application for membership and medical examination signed by the applicant, and all amendments to each thereof, shall constitute the agreement between the Society and the member, and copies of the same certified by the Secretary of the Society, or corresponding officer, shall be received in evidence of the terms and conditions thereof, and any changes, additions or amendments to such charter or articles of incorporation, or articles of association, if a voluntary association, con-

stitution or laws duly made or created subsequent to the issuance of the benefit certificate shall bind the member and his beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership."

The last paragraph of §9473 General Code of Ohio, relating to such Societies, provides:

"**Powers of Society.** Every such society shall have the power to make a constitution and by-laws for the government of the Society, the admission of its members, the management of its affairs and the fixing and the readjusting of the rates of contribution of its members from time to time; and it shall have the power to change, alter, add to, or amend such constitution and by-laws; and shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the Society."

There is no controversy about the Petitioner being a fraternal Benefit Society, or that it had the powers prescribed by the above Ohio Statutes.

II.

THE SIX MONTHS LIMITATION IN THE CONTRACT OF INSURANCE CONDITIONS THE RIGHT OF RECOVERY AGAINST, AND LIMITS THE LIABILITY OF, THE FRATERNAL BENEFIT SOCIETY, AND PERTAINS TO SUBSTANTIVE RIGHTS RATHER THAN THE REMEDY.

Home Ins. Company v. Dick, 281 U. S. 397

Dolan v. Royal Neighbors, 12 Mo. App. 147, 100 S. W. 498

Union Central Life Ins. Co. v. Barnes, 175 Ky. 364, 194 S. W. 339

It was the holding of the State Court that the question of when a suit might be brought on the certificate of insurance was a question solely of remedy which the Court of the forum was at liberty to apply under its own statutes and rules. On the authority of the cases cited on this Point in the Summary, Petitioner asserts that the six months limitation of time to sue is not a mere matter of remedy but conditions the right of recovery against and limits the liability of the Society and pertains to substantive rights. We understand that this is the view taken by this Court relating to a similar contract limitation in Home Ins. Co. v. Dick, 281 U. S. 397. In this case, the Court said relating to the contract limitation: "However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined". To the same effect are the other cases cited under this Point.

III.

THE CLAIMED CONFLICTING STATUTE IN SOUTH DAKOTA, (S. D. Code of 1919, Section 897, now Section 10.0705 S. D. Code of 1939) IS NOT MERELY A STATUTE OF LIMITATIONS TO FIX THE TIME WITHIN WHICH THE AID OF SOUTH DAKOTA COURTS MAY BE INVOKED; IT DECLARES VOID CONTRACTS WHICH FIX THE TIME IN WHICH SUIT MAY BE BROUGHT, AND DEALS WITH THE POWERS AND CAPACITIES OF PERSONS.

Home Ins. Co. v. Dick, 281 U. S. 397.

Said South Dakota statute reads as follows:

"Every provision in a contract restricting a party from enforcing his rights under it by usual legal proceedings in ordinary tribunals or limiting his time to do so, is void."

The applicable South Dakota statute prescribing the time within which an action might be brought on a contract was §33.0232 S. Dak. Code of 1939, previously §897 S. Dak. Code of 1919, which reads as follows:

"civil actions . . . can be commenced only within the following specified periods of time after the cause of action shall have accrued: (4) within six years: an action upon a contract, obligation, or liability, express or implied . . .".

Thus, if the South Dakota statute of limitation is to govern, the action was brought in time; but if the contract limitation is required to be enforced, the action was brought too late.

We point out under this number that the claimed conflicting statute (§10.0705 of the South Dakota Code of 1939) is not merely a statute of limitations, but that it declares void contracts which fix the time in which suit may be brought, and thus deals with the powers and capacities of persons to contract. The recognition and enforcement of the six months contract limitation is not the enforcement of a foreign statute of limitations, but a matter of sustaining the contract of the parties made. Dolan v. Royal Neighbors, 12 Mo. App. 147, 100 S. W. 498.

In M. W. A. v. Mixer, 267 U. S. 544, the rights at issue under the insurance certificate concerned a question of evidence, ordinarily ruled by the law of the forum. Under the Association contract contained in a by-law, "long continued absence of any member unheard of shall not . . . give any right to recover on any benefit certificate . . . until the full term of the member's expectancy of life has expired". In Nebraska where the suit was brought disappearance for ten years was sufficient to prove death. This by-law conditioned the right of recovery, and this Court held that it must be upheld in spite of the rule in Nebraska; otherwise the Plaintiff would be allowed to recover upon a state of facts denied in other jurisdictions. The situation in this case is parallel.

IV.

IN OHIO THE ESTABLISHED RULE IS THAT WHERE ONE OF HIS OWN VOLITION FOLLOWS AN INTENDED COURSE OF CONDUCT CULMINATING IN INJURY OR DEATH, THE RESULT MAY BE ACCIDENTAL, BUT NOT THE MEANS; AN EFFECT WHICH ENSUES AS A CONSEQUENCE OF A PURPOSED ACT IS NOT PRODUCED BY ACCIDENTAL MEANS.

Hassey v. Metropolitan Life Ins. Co., 140 Ohio State 266, 43 N. E.2d 229

Mitchell v. N. Y. Life Ins. Co., 136 Ohio State 551, 27 N. E.2d 243

New Amsterdam Casualty Co. v. Johnson, 91 Ohio State 155, 110 N. E. 475, L. R. A. 1916B 1018

See also, Burns v. Employers Liability Assur. Corp., 134 O. St. 222, 16 N. E.2d 316, 117 A. L. R. 733

The Ohio decisions, cited above, clearly establish a rule of construction on the language of this insurance certificate, which is that indemnity is granted only when there is bodily injury which is "effected through external, violent and accidental means". In the latest of these cases, Hassey v. Metropolitan Life Ins. Co., 140 Ohio State, supra, the rule is definitely stated in the terms of the above headlines. That Court approved an instruction of the trial court that the accident must be in the act that precedes the injury and not merely the unexpected result.

In the earlier Ohio case of Mitchell v. New York Life Ins. Co., 136 Ohio State 591, supra, the opinion quotes with approval from the opinion in Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491, as follows:

> "But it is not enough to establish liability under these clauses, that the death or injury was accidental in the understanding of the average man—that the result of the exposure 'was something unforeseen, unsuspected, extraordinary, an unlooked for mishap, and so an accident,' (citing cases)—for here the carefully chosen words defining liability distinguish between the result and the external means which produces it. The insurance is not against an accidental result. The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental."

V.

THE SOUTH DAKOTA SUPREME COURT IN THIS CASE ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THE DEATH OF FORD SHANE WAS PRODUCED BY EXTERNAL ACCIDENTAL MEANS, AND ERRONEOUSLY GAVE JUDGMENT AGAINST PETITIONER ON THIS ASSUMPTION. (R 61).

See opinion this case, 18 N. W.2d 759 (8)
See cases cited under No. IV.

The South Dakota Supreme Court in its opinion in this case does not dispute that the rule in Ohio is as stated. But the opinion goes on to say that because the courts in other jurisdictions have held that a death from the administering of anesthetic was a death effected by external accidental means, it may be assumed that the Ohio courts would do so also. This is certainly a wholly unwarranted and arbitrary assumption. Not all courts have ruled that way. There is no reason to assume that the Ohio Court would abandon the rule of construction that it has firmly established when it is applied to the circumstances of an anesthetic death. To assume this is to assume that the Ohio Court would be governed by caprice rather than by the application of the principles of construction announced.

VI.

THE SOUTH DAKOTA COURT ARBITRARILY AND WITHOUT REASONABLE BASIS ASSUMED THAT THE OHIO COURT WOULD HOLD THAT THERE WAS A PRESUMPTION THAT THE DEATH OF FORD SHANE WAS BY EXTERNAL ACCIDENTAL MEANS, IN THE ABSENCE OF EXPRESS PROOF TO THE CONTRARY; BASING SUCH ASSUMPTION ON THE HASSEY CASE IN OHIO, SUPRA, WHICH INVOLVED AN UNEXPLAINED DEATH. (R 61)

See opinion this case, 18 N. W.2d 759 (9)

In the Hassey case, 140 O. St. 266, 43 N. E.2d 229, the insured was found dead in a building wrecked by an explosion. The circumstances of the death were entirely unknown and unexplained. In such a case, says the Hassey opinion, there is a presumption that the death was accidental. In support of that statement, the opinion cites: 29 Am. Jur. p. 1082, §1443; Graham v. N. Y. Life Ins. Co., 182 Wash. 612, 619, 47 Pa.2d 1029, 1032; Mitchell v. Industrial Comm. 135 Ohio State 110, 19 N. E.2d 769. The latter two cases are suspected suicide cases, where the deaths were entirely unexplained. The reference to 29 Am. Jur., supra, contains the following:

> "In this respect, the authorities support the general rule that in an action on a policy insuring against death caused solely by external, violent and accidental means, the burden of proof is on the plaintiff to show from all the evidence that the death of the insured was the result of accidental as well as external and violent means, but that where death by unexplained, violent an dexternal means is established, a presumption is thereby created or prima facie proof is thereby made of the fact that the injuries were accidental, without direct and positive testimony on that point, since the law will not presume that the injuries were inflicted intentionally by the deceased or by some other person."

There was nothing unexplained nor mysterious about the circumstances of this death . All of the circumstances were detailed in the evidence. The

opinion states that there was no evidence to overcome the presumption of accident. This is in error. The evidence did disclose just what caused the death of Ford Shane. Dr. Janis, the attending physician, testified that the idiosyncracy was the cause of the death. Dr. Doyle testified to the same effect. The trial court so found.. The problem of the South Dakota Court was to ascertain what the Ohio Courts would hold in this situation. The only reasonable assumption is that the Ohio Court would apply the rule of presumption that the injury was accidental only in the class of cases noted in the Hassey case.

VII.

AN ERRONEOUS ASCERTAINMENT OF WHAT THE APPLICABLE LAW IN OHIO IS, AS EFFECTUALLY DENIES TO PETITIONER THE BENEFIT OF THE OHIO LAW AS IF THE SOUTH DAKOTA COURT HAD REFUSED TO APPLY THE OHIO LAW.

In order to correct the error of the State Court, this Court must have power to make its own determination of what the Ohio law is. Otherwise, it would be within the power of the state court practically to prevent a review here. Truax v. Corrigan, 257 U. S. 312.

VIII.

THE GOVERNMENTAL INTEREST OF THE STATE OF OHIO AS THE STATE OF THE DOMICILE OF THIS FRATERNAL BENEFIT ASSOCIATION UNDER THE CIRCUMSTANCES OF THIS CASE CLEARLY OUTWEIGHS AND OVERBALANCES THE INTEREST OF SOUTH DAKOTA, THE STATE OF THE FORUM; APPLYING THE DOCTRINE OF ALASKA PACKERS ASSO. v. INDUSTRIAL ACCI. COMMISSION, 294 U. S. 532; PAC. EMPLOYERS INS. CO. v. INDUSTRIAL ACCI. COMMISSION, 306 U. S. 493; KLAXON CO. v. STENTOR ELEC. MFG. CO., 313 U. S. 487; PINK v. A. A. A. HIGHWAY EXPRESS, 314 U. S. 201.

Applying the rule announced in Pink v. A.A.A. Highway Express Inc., 314 U. S. 201, and other cases cited in the Summary of this point, we analyze the respective interests of South Dakota, the state of the forum, and of Ohio, the state of the domicile of Petitioner and the state in which the contract was made.

On the part of South Dakota, one of its citizens was involved, who joined the petitioning association in South Dakota, and died there. The beneficiary named was a South Dakota citizen, but she relinquished her claim to an Ohio citizen, who brought this suit. On the authority of Hartford Acci. & Indem. Co., v. Delta & Pine Land Co., 292 U. S. 143, the fact that the insured was a resident of South Dakota, and the loss occurred there, does not give South Dakota the right to refuse to enforce this Ohio contract.

Ohio's interest comes from the facts: (1) that rights under a certificate of membership in a mutual fraternal benefit association of its creation are involved; (2) that a contract made and consummated in Ohio is involved; (3) that the suit was brought by an Ohio citizen, who left his own jurisdiction, where it was clear he could not recover, and came to South Dakota, a foreign jurisdiction, to bring his suit. Ohio should have an interest that one of its own citizens conforms to Ohio law in asserting rights against an Ohio fraternal benefit association.

This was an Ohio contract because the last act necessary to put the contract in force took place in Ohio. The insurance certificate is dated at Columbus, Ohio on December 21, 1922, and recites that the insured is admitted as an insured member at

12 o'clock noon on the day this certificate is dated. (R 26-A, Ex. 2 .....) There was nothing further to be done to put the certificate into force. Wastun v. Lincoln Nat'l Life Ins. Co., 12 F.2d 422; Young v .Order of U. C. T., 142 Neb. 566, 7 N. W. 2d 81; 45 C. J. 56 note 22; 44 C. J. S. p.509b.

There is no issue in this case as to whether Ford Shane became a member of the benefit Association, nor whether the contract for the benefits was made. These matters are admitted. The sole question at issue is as to rights which arose from the conceded membership in the association.

This is not merely a matter of requiring South Dakota to recognize a contract made in Ohio by an Ohio corporation. It involves more than a contract. It involves those rights which grow out of the complex and abiding relation which membership in a fraternal beneficiary society creates, and the necessity that those rights be administered under a single law. M. W. of America v. Mixer, supra.

An appraisal of the respective interests of South Dakota and Ohio, as indicated should be made in Alaska Packers Ass'n v. Comm'n., 294 U. S. 532, 547, shows that the interests of Ohio far outweigh and overbalance the governmental interests of South Dakota.

In the light of the foregoing contentions, we respectfully urge that the decision of the South Dakota court was erroneous, and we ask that such decision be reversed, and that Petitioner have full relief against the decision.

Respectfuly submitted,

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